* Child Custody

STATE OF MICHIGAN
SUPREME COURT

JK

SANDRA M. KNUTH,

Plaintiff/Appellee,

Supreme Court No.

~~Related SC Dkt. #120526~~

-vs-

Court of Appeals
Dkt. No. 231167

Opn 12/3/02

THOMAS E. KNUTH,

Defendant/Appellant.

Macomb Circuit Court
No. 98-2111-DM

P. Macerni

MICHAEL P. KAVANAUGH (P47282)
Attorney for Plaintiff/Appellee
23801 Gratiot Avenue
Eastpointe, MI 48021
(586) 776-1700; FAX 776-4680

MARGUERITE ANN HANES (P47690)
Attorney for Defendant/Appellant
PO Box 1142
Mt. Clemens, MI 48046-1142
(586) 493-9080; FAX 586-9212

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DEFENDANT-APPELLANT'S DELAYED APPLICATION FOR LEAVE TO APPEAL

AFFIDAVIT EXPLAINING DELAY

BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

NOTICE OF FILING

PROOF OF SERVICE

FILING FEE

Dated: January 28, 2003

Submitted by:

MARGUERITE ANN HANES (P47690)
Attorney for Defendant/Appellant

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STATE OF MICHIGAN
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Attorney for Plaintiff/Appellee
23801 Gratiot Avenue
Eastpointe, MI 48021
(586) 776-1700; FAX 776-4680

MARGUERITE ANN HANES (P47690)
Attorney for Defendant/Appellant
PO Box 1142
Mt. Clemens, MI 48046-1142
(586) 493-9080; FAX 586-9212

DELAYED APPLICATION FOR LEAVE TO APPEAL

I. Statement of Judgments and Orders appealed from.

Defendant-Appellant seeks leave to appeal from the Court of Appeals December 3, 2002 Opinion and Order affirming the trial court's November 6, 2001 Judgment of Divorce regarding subject matter jurisdiction over the divorce proceeding, subject matter jurisdiction over the child custody dispute, and the trial court's ruling denying an adjournment and forcing defendant to represent himself without counsel at a 3 day trial, resulting in a denial of due process and an unfair, inequitable property distribution.

Defendant-Appellant's Court of Appeals Brief on Appeal is attached hereto along with the Court of Appeals' December 3, 2002

Opinion and Order.

Defendant-Appellant asks that the decision of the Court of Appeals be reversed, the Judgment of Divorce entered by the Macomb Circuit Court be vacated, the case be dismissed in its entirety for lack of subject-matter jurisdiction, and any and every order ever issued in this case to be held void *ab initio*. In the alternative, Defendant-Appellant seeks a new trial based on a denial of due process in being forced to represent himself in a 3 day trial without benefit of counsel.

II. Questions presented for review.

This Court has never allowed subject matter jurisdiction in a divorce case to be established through any "constructive residence" unless such absence from the State of Michigan has been "involuntary". Here the Court of Appeals and the trial court found subject matter jurisdiction despite the Plaintiff's admitted voluntary absence from the state for a period of over 17 years. The Court of Appeals did not even bother to address this Court's precedential rulings on the issue, although specifically and pointedly argued by Appellant in his Brief on Appeal. The Court of Appeals decision is in direct, flagrant disregard for this Court's specific rulings. The Court of Appeals decision clearly conflicts with this Court's precedent and cannot be allowed to stand.

The Court of Appeals decision as to the child custody dispute

is equally erroneous and in direct contravention to the law. Basically the Court held that "substantial connection" jurisdiction is proper when a mother absconds with the child to the state because the child now has "substantial connections" with the state because the mother absconded with the child to the state! Further, the Court of Appeals ignored the fact that the Macomb Circuit Court did not follow the procedures mandated under the UCCJA and also states "facts" that have no record support to "justify" its unlawful decision. Finally, the Court of Appeals completely ignored the issue of violating the Parental Kidnapping Prevention Act, though clearly preserved and properly raised on appeal.

Finally, the Court of Appeals clearly erred when it held that Defendant-Appellant's denial of due process issue had "no merit." The "facts" cited by the Court of Appeals to support its conclusion know no record support whatsoever; the relevant facts which are taken from the record are completely ignored. The Court of Appeals did not even apply its <u>own</u> precedent for analyzing the issue.

Review of the attached Appellant's Brief on Appeal and the Brief in Support of this Application conclusively show that the decision of the Court of Appeals is directly contrary to Supreme Court precedent. MCR 7.302(B)(5). The issue of subject matter jurisdiction also involves legal principles of major significance to the state's jurisprudence, directly affecting families and vulnerable young children. MCR 7.302(B)(3). This Court has not

spoken on the issue of subject matter jurisdiction in divorce cases since 1960. The Court of Appeals decision is also clearly erroneous and will cause material injustice. No person can be subjected to the power of a court with no power over him to begin with. Further, Defendant-Appellant was denied due process when he was forced to go to trial without the assistance of counsel. MCR 7.302(B)(5).

Accordingly, Defendant-Appellant respectfully requests this Honorable Court to GRANT his application or issue the appropriate Order for substantive relief pursuant to MCR 7.302(F)(1).

IV. Statement of material proceedings and facts.

To avoid repetition, Defendant-Appellant incorporates verbatim his record documented Statement of Facts contained in Appendix A, his appellate brief. In short, this is an interstate divorce case involving parties who admittedly never lived in the state of Michigan at any time during their marriage. It is also admitted that the plaintiff did not live in the state of Michigan for the statutorily required 180 days immediately preceding the filing of the complaint. The case also involves substantial issues of jurisdiction under the UCCJA and the PKPA. Finally, Defendant-Appellant, a career officer as a Lieutenant Colonel and surgeon in the United States Army stationed at Fort campbell, Kentucky, and residing in the marital home in Nashville, Tennessee, was compelled

to submit to a three day trial without benefit of counsel, despite the fact that two prior adjournments were agreed to by plaintiff and were in fact precluded by Defendant-Appellant's military deployment orders. The trial court had also "ordered" that Defendant be allowed a dispursement of $5,000 from an investment account under injunction to retain counsel, but such "order" was never timely or properly entered and could not be timely acted upon. There is no dispute as to these record facts.

Judgment was entered on November 6, 2000. Defendant Appellant timely filed his claim of appeal on November 27, 2000 and timely ordered all lower court transcripts. On motion and by order dated 6/6/01, Defendant-Appellant's Brief was due to be filed on or before May 30, 2001. Due to serious health difficulties, counsel could not satisfactorily complete the brief within that time frame.

On July 19, 2001 the case was dismissed under MCR 7.217(A) and counsel assessed a $200 sanction for "allowing the case to appear on the involuntary dismissal docket."

On September 13, 2001, counsel filed a motion for reinstatement under MCR 7.217(D), requesting an order allowing her 28 days to file the brief "or whatever time period this Court deems appropriate under the circumstances", and explaining counsel's health difficulties and attendant compromising circumstances.

On October 10, 2001 the Court of Appeals issued its Order denying the motion "for failure to show mistake, inadvertence, or

excusable neglect." Thereafter the Court of Appeals refused to accept the Brief for filing along with a motion for rehearing.

On December 5, 2001, Defendant-Appellant timely filed a delayed application for leave to appeal with this Court.

On June 11, 2002, this Court issued an Order under MCR 7.302(F)(1), in lieu of granting leave, VACATING the October 10, 2001 order of the Court of Appeals and REMANDING to that Court for reinstatement of the appeal.

On June 18, 2002, Defendant-Appellant filed his Brief on Appeal with the Court of Appeals. On or about August 5, 2002 Plaintiff-Appellee filed her responsive Brief on Appeal with the Court of Appeals.

On December 3, 2002, the Court of Appeals issued its Opinion in the case affirming the trial court.

This Delayed Application is timely filed on January 28, 2003.

Additional facts will be cited in context.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S FINDING OF SUBJECT MATTER JURISDICTION WHERE ALL MICHIGAN SUPREME COURT PRECEDENT ON THIS ISSUE DEMANDS ACTUAL RESIDENCE OF THE PLAINTIFF FOR THE REQUIRED STATUTORY 180 DAYS UNDER MCL 552.9 AND DOES NOT RECOGNIZE ANY CONSTRUCTIVE RESIDENCE AS MEETING THE DICTATES OF THE STATUTE.

Since at least 1898, our Supreme Court has continually and repeatedly set forth the meaning of the jurisdictional residency

requirements of the divorce statutes in Michigan. Currently, that statute reads in relevant part as follows:

> A judgment of divorce shall not be granted by a court in this state in an action of divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint.
>
> MCL 552.9(1)

In Wright v Genesee Circuit Court Judge, 117 Mich 244 (1838), this Court ruled most clearly and unambiguously:

> Residence mans the place where one resides, an abode, a dwelling or habitation, especially a settled or permanent home or domicile. Residence is made up of fact and intentions. ***There must be the fact of abode, and the intention of remaining.***
>
> Id. At 245 (emphasis supplied).

The plaintiff in Wright had resided in the state of Michigan for many years but had moved from one county to the next to be with her extended family and to escape her husband's cruelty. The county residency requirement then had no time requirement. Because plaintiff had physically moved to the adjacent county and intended to remain with her family this Court reversed the trial court and remanded for determination on the merits. Id. at 245-246.

In Bradfield v Bradfield, 154 Mich 115 (1908), the parties were long term residents of Grand Rapids. In June 1904 the wife took the children and went to Pontiac to attend a wedding. She and the children then went to New Jersey with her mother without the

knowledge or consent of her husband. In January 1905 the wife wrote to her husband announcing that she intended to separate for good The wife returned to Michigan in April 1905, stayed for 6 months, and packed her belongings. In September 1905 the wife returned to New Jersey. Finally in August 1906 the wife returned to Michigan, made arrangements to move to Pontiac, and filed for divorce. This Court held that because the wife had physically resided in New Jersey for 13 of the 20 months preceding the filing and announced intention of leaving her husband, she had lost her Michigan residency and the court was without jurisdiction to entertain her suit (then a one year statute). This Court specifically held, "[A] claimed intention [to reside] without acts to support it is not controlling." Id. at 117. **Id.** at 111(emphasis supplied).

In Smith v Foto, 285 Mich 361 (1938), where thisCourt held the divorce decree granted to the defendant therein to be invalid, this Court again reiterated its earlier ruling from Wright, supra:

> One who is not a resident of Michigan may not appeal to its courts for divorce. Wright v Genesee Circuit Judge, 117 Mich 244, 75 N.W 465; Hoffman v Hoffman, 155 Mich 328, 118 N.W. 990; Bradfield v Bradfield, 154 Mich 115, 117 N.W. 588, 129 Am.St.Rep. 468. "Residency in the divorce statutes of this State, means the place where one resides; an abode; a dwelling or habitation; especially, a settled or permanent home or domicile. Residence is made up of fact and intention. *There must by the fact of abode, and the intention of remaining.* Wright v Circuit Judge, 117 Mich 244, 75 N.W. 465.
>
> Smith at 368 (emphasis supplied).

Further, this Court went on to illuminate the law of actual residence for the statutory period:

> *The statute requires a full year's residence, and a less period does not give the court jurisdiction* * * * Divorce proceedings are wholly statutory, and not within the original cognizance of courts of equity * * * The provision of the statute as to residence is mandatory, and it must be made to appear affirmatively; otherwise the court is without jurisdiction. White v White, 242 Mich 555, 219 N.W 593, 594, citing Bradfield v Bradfield, 154 Mich 115, 117 N.W, 588, 129 Am.St.Rep. 468; Hoffman v Hoffman, 155 Mich 328, 118 N.W. 990.
>
> Smith, at 370 (emphasis supplied)

In Nalley v Nalley, 290 Mich 109 (1939), this Court again reaffirmed the one year *actual* residency requirement. The parties had married in Illinois but moved to Michigan where they lived for approximately 16 months before the wife filed for divorce. The circuit court dismissed the bill on the sole ground that two years residency in Michigan were required to give the court jurisdiction. This Court reversed, finding the one year provision controlled and not the two year provision, stating:

> It was alleged and the uncontradicted testimony disclosed that *plaintiff lived in this state at the time suit was started and for more than a year prior thereto,* that the cause of divorce arose in this state and the defendant was then domiciled in this state.

In Hatch v Hatch, 581 (1949), the parties had originally been married in Michigan, but then moved to California. The wife returned to Michigan after a year or so and filed for separate maintenance three months later. Such suit had no residency time requirement then. The husband then filed a counter suit for

divorce. His suit was dismissed for lack of jurisdiction as he had not physically resided in Michigan for the statutorily prescribed period for divorce actions.

The cases are virtually legion where this Court has required *actual* residency within the boundaries of this state to satisfy the statutory residency requirement for subject matter jurisdiction. In Stamadianos v Stamadianos, 425 Mich 1 (1986), admittedly a case concerning the ten day residency requirement, this Court determined such to be jurisdictional as well, and in doing so, first reviewed its long line of jurisprudence regarding the jurisdictional nature of state residency requirements, and confirming the requirement of *actual* residency for the required statutory period:

> State residency requirements, by definition, obligate a plaintiff, in order to obtain a decree of divorce, *to reside a certain period of time within the state in which the divorce decree is sought*. These state residency requirements have been upheld by the United States Supreme Court against the contention that they violate the United States Constitution. Sosna v Iowa, 419 U.S. 393, 95 S.Ct. 553; 42 L.Ed.2d 532 (1975). Furthermore, many jurisdictions, including Michigan, have held that compliance with the statutory requirement as to the length of residency is jurisdictional and that the failure of a court to comply renders a divorce decree absolutely void. (Footnote omitted).
>
> In *Kennedy v Kennedy*, 325 Mich 613, 617 39 N.W.2d 67 (1949), this Court held that where there was no evidence that either of the parties to divorce actual had resided in the state for at least one year as required by the applicable statute, the trial court did not have jurisdiction to render a divorce decree. . . .
>
> See also *White v White*, 242 Mich 555, 219 N.W. 593 (1928); *Bradfield v Bradfield*, supra; and *Pierson v Pierson*, 132 Mich App 667, 347 N.W. 2d 779 (1984).

In Banfield v Banfield, 318 Mich 38 (1947) cited and discussed in Appellant's Appellate Brief at p 24 (attached), the trialk court held it had no jurisdiction because plaintiff's argument in favor of "constructive" residency violated the statute: ther must be actual residency within the boundaries of the state. Id. at 41. This Court agreed, stating that "*An analysis of all of the provisions of the section indicates clearly that the term `residence' was used in the sense of an actual residence rather than a constructive one.*" Id. At 42, emphasis supplied. In fact, this Court went on to point out that in White, supra, jurisdiction had been denied where the parties had lived in Michigan for 11 months and 24 days before filing suit, just 6 days shy of making the one year requirement.

> The statute requires a full year's residence and a less period does not give the court jurisdiction. Such a residence was not established by the plaintiff. Divorce proceedings are wholly statutory and not within the original cognizance of courts of equity. Haines v Haines, 35 Mich 138. The provision of the statute as to residence is mandatory and it must be made to appear affirmatively, otherwise the court is without jurisdiction. Banfield at 42-43, citing White, supra.

Finally, there is only once case found where this Court allowed a very narrow exception to the actual residence rule. In Coyouomjian v Anspach, 360 Mich 371 (1960), cited and argued in Defendant's Appellate Brief at p 24-25, this Court allowed jurisdiction in Michigan for filing a divorce by a Michigan woman who had been declared insane by her husband, allowed to live with

Pennsylvania relatives while still under the jurisdiction of the State mental institution, and then when declared sane, promptly filed for divorce in Michigan. Citing the rule of law laid down in Smith v Foto and Banfield v Banfield that jurisdiction in divorce cases requires actual residence and NOT constructive residence, the Court held:

> *We do not intend to overrule or otherwise limit our previous decisions requiring actual abode in Michigan as a prerequisite to the statutory residence requirements in divorce actions.* However, the peculiar facts involved here compel us to hold that [plaintiff] did not lose her Michigan residence when she went to live with relatives in Pennsylvania to who she was "paroled" from the mental institution by its medical superintendent. . . . To hold that she lost her Michigan residence thereby would be unconscionable. By such a holding, we would have to assume she was capable of intending to relinquish her residence here even before she was adjudicated sane and judicially restored to her civil rights. This assumption we cannot make."
>
> Couyoumjian at 383(emphasis supplied).

In other words, this Court carved out an exception to the "actual residence" requirement because the wife's absence from the state was wholly involuntary. As argued and documented in appellant's Brief, pp 23, there is nothing about the instant case that calls for anything other than straightforward application of long standing precedent by this Court.

No case has been found since Banfield and Couyoumjian where this Court addresses this area of its jurisprudence, other than its confirmation of long standing law in Stamadianos. The saga of Beason v Beason, finally culminating in this Court's Order at 447

Mich 1023 reversing the judgment of the Court of Appeals and reinstating the judgment of the trial court, does not concern the statutory requirements of jurisdictional residence, but the meaning of the word "reside" in the parties' judgment of divorce. This Court apparently held that the issue was one of fact, not of law, and that "there was no clear error in the trial court's findings of fact and conclusion of law."

The Court of Appeals decision in this case is directly contrary to the law laid down by this Court as far back as 1898 beginning with Wright v Genesee Circuit Court Judge and all the way through Banfield, Couyoumjian, and Stamadianos. Such decision must be reversed, the trial court's judgment vacated, and all orders ever entered by the Macomb Circuit Court held void for lack of jurisdiction.

II. THE COURT OF APPEALS ERRED WHEN IT UPHELD THE TRIAL COURT ASSUMING CUSTODY JURISDICTION OF THIS CASE IN VIOLATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT.

To avoid repetition, Defendant incorporates verbatim his argument in his appellate Brief on this issue at pp 26-34. Only a critique of the Court of Appeals errors will be made here. First, the COA claims that "the Tennessee court indicated its willingness to decline jurisdiction in the custody dispute." Opinion, p 2. There is absolutely no record support for such statement (See pp 6-9, Statement of Facts, Defendant's Appellate Brief), other than the

statement of the Macomb Circuit court during the March 4, 1999 Motion hearing (see p 10, SOF). However, on March 18, 1999, appellant filed an amendedcomplaint in his original divorce action in Tennessee seeking sole custody of his child. See p 11, SOF, and note 1 for full explanation. Thus the Tennessee Montgomery Court, Judge Catalano, determined to hold the matter in abeyance. See also SOF, p 12; see also brief at p 33-34. (Tennessee has not declined jurisdiction),

The second error by the Court of Appeals concerns the issue of "substantial connection" jurisdiction. In effect, the COA is ruling that when a parent absconds with a child to the state of Michigan, simply because the minor child is now held in the state my mother and relatives, somehow the child has established "significant connections" with the state and the court has jurisdiction!!! This "rationale" is preposterous on its face. Thsi child was not born here, this child has never lived here. The state requires both parent AND child to have "significant connections." The interpretation given by the Court of Appeals means that every child automatically has "significant connection" to Anystate, USA by the simple expedient of having one parent who was born somewhere. Such interpretation flaunts the very purpose of the UCCJA and in fact encourages adult parents to grab their children and run to a friendly state of long ago origin. Substantial connection cannot be established by the abduction of

children. Further, the COA did not even address Defendant's claim of violation of the PKPU. Such arguments are incorporated herein in their entirety. In short, the Court of Appeals is dead wrong on this issue and much be reversed, as must the Macomb Circuit Court, for all of the reasons reiterated in Defendants attached brief on appeal.

III. THE COURT OF APPEALS ERRED WHEN IT REFUSED TO GRANT DEFENDANT RELIEF FROM THE TRIAL COURT'S DENIAL OF DUE PROCESS IN FORCING DEFENDANT TO REPRESENT HIMSELF AT A THREE DAY TRIAL WITHOUT ANY ASSISTANCE OF COUNSEL.

Again, to conserve judicial resources and avoid repetition, Defendant incorporates verbatim his record documented statement of facts and argument under this issue in his attached brief at pp 34-37. Again, only specific errors of the COA will be pointed out. First and foremost, the COA did not even analyze the issue under recognized jurisprudence. See, for example, in addition to cases cited in Appellant's brief, Ruffin v Kent, 139 Mich App 479, 480-481 (1984) and cases cited therein: "The grant or denial of a motion for adjournment is within the trial court's discretion; cases upholding a denial have always involved some combination of numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant." Id.

Nowhere in the COA opinion is such an analysis even mentioned. If it had been analyzed properly under the governing law, Appellant would clearly have been granted a new trial for violation and

denial of his due process rights. This service man was twice prevented from trial due to military orders; the third trial date he repeatedly petitioned for funds to hire counsel; he lost two previous counsel because the first moved his practice out of state; the second counsel obtained virtually overnight ended up having a complete breakdown in the attorney/client relationship after several months; and the court agreed Defendant needed funds to hire new counsel and ordered such funds to be released. That money was NEVER released to Defendant. The trial court's abuse of discretion here is palpable, and the Court of Appeals analysis is non-existent, including ignoring all dispositive and relevant facts cited and documented to it in Appellant's Brief.

The Court of Appeals must be reversed and Defendant granted a new trial to achieve a fair and equitable property settlement and parenting time schedule with his young son.

CONCLUSION

For all of the above reasons, Defendant-Appellant prays this Honorable Court will GRANT his application or in lieu thereof, accord him the appropriate relief under its plenary powers.

Respectfully Submitted,

Marguerite Ann Hanes

MARGUERITE ANN HANES (P47690)
Attorney for Defendant-Appellant

Dated: 1/28/03

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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JOSEPH E. MIHELICH (P17705)
Attorney for Plaintiff/Appellee
23801 Gratiot Avenue
Eastpointe, MI 48021-1655
(586) 776-1700; FAX 776-4680

MARGUERITE ANN HANES (P47690)
Attorney for Defendant/Appellant
PO Box 1142
Mt. Clemens, MI 48046-1142
(586) 751-2146; FAX 751-1884

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Dated: June 17, 2002

Submitted By:
MARGUERITE ANN HANES (P47690)
Attorney for Defendant-Appellant
Thomas E. Knuth

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STATEMENT OF BASIS OF JURISDICTION

On November 6, 2000 the Macomb Circuit Court, the Hon. Peter J. Maceroni, entered a judgment of divorce.

On November 27, 2000 Defendant filed his Claim of Appeal.

Jurisdiction is vested in this Court pursuant to MCR 7.203(A)(1) which provides for this Court's jurisdiction over an appeal of right filed by an aggrieved party from a final judgment of the circuit court. MCR 7.202(7)(a) defines a final judgment in a civil case as the first judgment that disposes of all the claims and adjudicates the rights and liabilities of all the parties. The 11/6/00 judgement of divorce entered by the Macomb Circuit Court meets these requirements.

The time limits for filing an appeal of right are also jurisdictional. Under MCR 7.204(A)(1), an appeal of right in a civil action must be taken within 21 days after entry of the judgment appealed. Defendant's Claim of Appeal was filed within this time frame.

This Court has jurisdiction over this appeal.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER TRIAL COURT ERRED WHEN IT FOUND IT HAD SUBJECT MATTER JURISDICTION UNDER MCL 552.9 WHERE PLAINTIFF HAD NOT PHYSICALLY LIVED IN MICHIGAN FOR 180 DAYS PRECEDING THE FILING OF THE COMPLAINT AND THE COURT DECIDED THE ISSUE OF INTENT ON THE BASIS OF COMPETING AFFIDAVITS WITHOUT HOLDING AN EVIDENTIARY HEARING?

Trial court said NO.
Appellant says YES.

II. WHETHER TRIAL COURT ERRED WHEN IT ASSUMED JURISDICTION OVER THE CUSTODY DISPUTE WITHOUT FIRST CONSULTING WITH THE TENNESSEE COURT AND WHERE TENNESSEE IS THE HOME STATE OF THE CHILD AND MICHIGAN HAS NO SIGNIFICANT CONNECTION JURISDICTION, CONTRARY TO THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT?

Trial court said NO.
Appellant says YES.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN THE TRIAL COURT REFUSED DEFENDANT'S MOTION TO ADJOURN TRIAL IN ORDER TO HIRE COUNSEL WHERE THE TRIAL COURT'S PRIOR ORDER ALLOWING DEFENDANT ACCESS TO FUNDS FOR THAT PURPOSE HAD NEVER BEEN IMPLEMENTED, PRIOR ADJOURNMENTS HAD BEEN AGREED TO AND CAUSED BY DEFENDANT'S MILITARY ORDERS, DEFENDANT SHOWED DUE DILIGENCE, AND THERE WOULD HAVE BEEN NO INJUSTICE TO PLAINTIFF?

Trial court said NO.
Appellant says YES.

STATEMENT OF FACTS

Defendant-Appellant Thomas E. Knuth appeals as of right the November 6, 2000 Judgment of Divorce entered by Macomb Circuit Court Judge Peter J. Maceroni, entered pursuant to the trial court's opinion issued on February 10, 2000 following a three day trial in August 1999 where Defendant-Appellant appeared in pro per over his continuing objections. For ease of reference, the transcripts will be cited as follows:

MT = motion hearing transcripts, followed by date

T1 = first day of trial, 8/25/99
T2 = second day of trial, 8/26/99
T3 = third day of trial, 8/27/99

Plaintiff was born in Michigan (d.o.b. 12/11/58). Defendant was born in Ohio (d.o.b. 5/22/58). In 1983 the parties met in Alexandria, Virginia where Plaintiff was a 25 year old English teacher. Plaintiff had been living and working in Alexandria, Virginia for past two years ever since she had dropped out of Georgetown University law school after one semester in 1981. Plaintiff had a Virginia drivers' license (Defendant's 7/22/98 Reply Brief, Defendant's Affidavit). Defendant was a 25 year old medical student attending a military medical school and already committed to a military career in the United States Army (T2, pp 156, 263). In December 1984 the parties came to Michigan to be married in Eastpointe, where plaintiff had been born and where her parents still lived (Plaintiff's 7/17/98 Brief in Support of Answer, Plaintiff's Affidavit).

For the next 13 years, the parties resided in various states

according to Defendant's military assignments. Their only child, Alexander, was born in November 1995 while the parties were living in Georgia (Id). In June 1997 when Alexander was a year and a half the parties moved to Tennessee. By that time Defendant had attained the rank of Lieutenant Colonel (Defendant's Motion for Dismissal, 7/7/98, ¶ 5). The parties had decided that Defendant should accept a military assignment to Fort Campbell, Kentucky because the Army would allow Defendant to remain at that post for the rest of his army career (Defendant's 7/22/98 Affidavit). Accordingly, Defendant took the position of Chief of Surgery and Director of the Regional Trauma Network at the Blanchfield Army Community Hospital in Kentucky (Defendant's Objections, 2/10/99, ¶ 5). The parties purchased a home in Nashville, Tennessee about an hour's drive away from the Kentucky army base and hospital. They reasoned that Nashville was a large, cosmopolitan city which would provide the best opportunities for plaintiff to continue her career in medical marketing and for Defendant to continue his medical practice after leaving the army (Defendant's 7/22/98 Affidavit). Plaintiff obtained a Tennessee drivers' license and began looking for work in the Nashville area (Id).

In March 1998 while Defendant was away on military field training, Plaintiff came to Michigan and filed for divorce without defendant's knowledge. When Defendant returned home, he discovered plaintiff gone with Alexander and the divorce papers waiting for him. Defendant was unable to find plaintiff for the next week. Unknown to Defendant, Plaintiff had gone to Las Vegas with

Alexander (Plaintiff Affidavit, 7/17/98; MT, 12/22/98, pp 15-17). On May 1, 1998 Plaintiff returned to the marital home in Tennessee. The parties tried to work out a marital dissolution agreement (Id.) While Defendant was gone for a 72 hour shift Plaintiff had her mother fly in to help pack up the house, took what she wanted, and went back to Michigan with Alexander, all without Defendant's knowledge (MT, 12/22/98, pp 15-17). Plaintiff arrived back in Michigan on May 16, 1998 (Plaintiff's Affidavit, 7/17/98).

On April 15, 1998 plaintiff had filed her complaint for divorce in the Macomb County Circuit Court, alleging that she had been a resident of Michigan for 180 days immediately preceding the filing (Complaint, 4/15/98, ¶ 3). Conversely, plaintiff admitted that she was "currently residing in the marital home [in] Nashville, Tennessee" and that the minor child had also been living at the marital home in Tennessee for the past two years (Complaint, 4/15/98, ¶¶ 4, 7). Plaintiff's Summons, Verified Statement, and Record of Divorce or Annulment all listed her address as the marital home in Tennessee (record filings, 4/15/98).

On April 20, 1998 the court entered three ex parte orders: a Mutual Restraining Order as to personal property and insurance policies; an Order for Maintenance of the Status Quo requiring both parties to maintain marital expenses and debts; and an Income Withholding Order (orders of record).

On May 22, 1998 the court entered an Ex Parte Order for Temporary Custody and Child Support awarding temporary custody of the minor child to plaintiff, granting reasonable rights of

parenting time to defendant, and setting child support at $240 per week (order of record).

On May 28, 1998 Defendant filed a Complaint for Absolute Divorce in the Chancery Court for Montgomery County, Tennessee, Case No. 98-05-0154 9 [Exhibit 1, attached to Defendant's 7/8/98 Motion for Dismissal by Summary Disposition Pursuant to MCR 2.116(C)(4)].

On June 26, 1998 the Friend of the Court issued a Final Recommendation recommending custody be vested in plaintiff. All financial issues were reserved pending the court obtaining personal jurisdiction over defendant (FOC Final Recommendation, 6/26/98). The Friend of the Court specifically declined to enforce the Income Withholding Order (MT 1/25/99, pp 3-4).

On July 8, 1998 Defendant entered a special appearance via local counsel Mr. Richard P. Diehl to challenge the jurisdiction of the court by filing a motion for summary disposition under MCR 2.116(C)(4). Defendant asserted that the court lacked jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, MCL 600.653, and Michigan's 180 day residency jurisdiction statute, MCL 552.9 based, inter alia, on Plaintiff's record admissions of residency in Tennessee and the intent of the parties in relocating to Tennessee and purchasing the marital home there. Defendant attached a true copy of his Tennessee Complaint for Absolute Divorce to the motion (Defendant's Motion, Brief, and Exhibit, 7/7/98). In the alternative Defendant requested the matter be stayed under the Soldiers and Sailors Civil Relief Act (Id).

On July 21, 1998 Plaintiff filed an Answer opposing the motion, admitting her and the child's physical residence at the marital home in Tennessee from July of 1997, but asserting that she had "returned" to Michigan on 3/24/98 to take up residence with her parents in Eastpointe, had never intended to make Tennessee her home, had never intended to give up Michigan as her domicile during her marriage, and always intended Michigan to be her domicile. The facts supporting Plaintiff's intent were that she had visited family in Michigan numerous times during the marriage, had maintained her Michigan voters registration since 1992, and had paid yearly fitness club dues since 1981 to the Bally Health Club in Eastpointe, Michigan (Plaintiff's Answer and Brief with Affidavit, 7/21/98).

On July 22, 1998 Defendant filed a Reply Brief, supported by Affidavit, stating that Plaintiff had maintained a residence outside of Michigan since at least 1981 and had never lived in Michigan since. Defendant cited facts disputing Plaintiff's alleged "intent":

> 5. My wife was not a resident of Michigan when I met her in Alexandria, Virginia in 1983 -- she was teaching high school English In Virginia and had been domiciled there for at least two years prior when she dropped out of the Georgetown University law school after one semester; she was at the time a Virginia resident because she had a Virginia driver's license, she paid taxes in Virginia, she was domiciled in Virginia, and the military had nothing to do with that residency.
>
> 6. After we were married, she never established a residency separate from mine and I have never been a resident of Michigan.
>
> 7. We decided, as a joint decision, to accept a military assignment to Fort Campbell, Kentucky because I would be

allowed by the Army to remain at that Post until I was eligible for retirement.

8. We specifically decided to purchase a home in Nashville, Tennessee, in an adjacent State and over an hour's drive from Fort Campbell, Kentucky, because the large city afforded my wife the opportunity to get a job in medical marketing, the field she had been working in while we lived in Georgia, and provided a ready opportunity for me to continue my medical practice after retirement in a large, cosmopolitan venue.

9. My wife obtained a Tennessee driver's license and sought a job after we moved to Nashville on or about July 1, 1997 -- at no time was there any intent on her part to take up residency in any State other than Tennessee where we were domiciled until at least May 1998; a month after she filed for divorce in Michigan, left our residence in Tennessee, took our son away from me to Michigan, and moved in with her parents in Eastpointe.

(Defendant's Reply Brief, Affidavit, 7/22/98)

At oral argument on the motion, Plaintiff's counsel admitted Plaintiff had registered to vote in Michigan in 1992 while the parties were living in Hawaii and voted out of the state of Michigan once because a friend of the parties was running for an office (MT, 7/27/98, p 6). The court stated it would notify counsel if it felt the need for an evidentiary hearing (MT, 7/27/98, p 8).

On September 24, 1998 the court issued its opinion and order denying Defendant's motion without holding an evidentiary hearing (9/24/98, Opinion and Order).

On October 15, 1998 the Tennessee Davidson County Court, Case No. 98D-2257, Judge Robinson, contacted the Macomb Circuit Court.

On October 27, 1998, the Macomb Circuit Court, Judge Maceroni, contacted the Tennessee Davidson County Court and left a message (MT, 12/22/98, p 6).

On October 27, 1998 the Tennessee Davidson County Court, Case No. 98D-2257, Judge Robinson, entered an Order finding that it had jurisdiction over the case, but did not differentiate between its "home state" custody jurisdiction under the UCCJA and its jurisdiction over the divorce action (Defendant's 11/13/98 Emergency Motion, ¶ 9, Exhibit 2; see also ¶ 12).

On 11/13/98 Defendant filed his Answer to the Complaint denying plaintiff's Michigan residency, challenging the trial court's jurisdiction under MCL 552.9, and seeking custody of Alexander (Answer, 11/13/98).

On 11/25/98 the Tennessee Davidson County Court in Case No. 98D-2257, Judge Robinson, entered an Order stating

> [T]hat this Court has jurisdiction over all matters of Divorce, and jurisdiction over child custody matters under the UCCJA as the "Home State".
>
> It is further [ordered] that this Court will stay all actions and proceedings as to child custody in this matter pursuant to T.C.A Code 36-6-207.

(Defendant's 12/22/98 Objection to Entry of Friend of the Court Recommended Order, etc., Exhibit 1; see MT 12/22/98, p 8).

On 12/22/98 Defendant filed Objections to a proposed FOC order regarding parenting time, asking for Christmas parenting time and asking the court to communicate with the Tennessee Court to determine which of the two courts would exercise jurisdiction under the UCCJA (Id., ¶ 18 and Prayer for Relief B).

At the hearing on Defendant's objections and motion, the trial court stated that "to my knowledge no court has contacted this Court, and that does offend me." (MT, 12/22/98, p 5). The court

then corrected the record to reflect that Tennessee Judge Muriel Robinson had called the Macomb Circuit Court on 10/15/98; the trial court had returned the call on 10/27/98 and left a message; but there had been no contact since. The trial court ultimately characterized these calls as "attempted communication" which "has not transpired" (MT, 12/22/98, pp 6, 13).

An order entered on January 13, 1999 restrained Defendant from removing Alexander from Michigan

> pending communication between this Court and Honorable Muriel Robinson, in the Fourth Circuit Court for Davidson County, Tennessee at Nashville, to determine which state is the appropriate forum to exercise jurisdiction of the child custody determination, pursuant to the UCCJA, specifically MCL 600.651 et seq., or until further order of this Court.
>
> (Order, 1/13/99)

On February 1, 1999 defendant's counsel Mr. Diehl filed a motion to withdraw because he had accepted a position with a company in Virginia and was in the process of dissolving his Michigan firm. Mr. Diehl stated that Defendant had already met with substitute counsel Mr. W. Allen Cawley, Jr. and had agreed to the new representation on December 23, 1998. Defendant had signed a stipulation for substitution of counsel but Mr. Cawley had not yet entered the stipulation with the court (Motion for Leave to Withdraw, 2/1/99).

On February 3, 1999 attorney David Griem appeared on Defendant's behalf for the scheduled 2/3/99 status conference. The conference was adjourned to 3/4/99 (Docket entries, 2/3/99). The court issued another Order duplicating the 1/13/99 Order preventing

removal of the minor child from the State of Michigan pending communication with the Tennessee court (Order, 2/3/99).

On February 5, 1999 attorneys David Griem and Sharon LaDuke entered an appearance on behalf of Defendant (Appearance, Notice of Appearance, 2/5/99).

On February 23, 1999 the court entered an Order for Substitution of Attorney, substituting attorneys Sharon LaDuke and David Griem for Defendant's prior counsel Mr. Diehl (Order, 2/23/99).

On March 4, 1999 the adjourned status conference was held. Plaintiff's 1/8/99 motion which resulted in the 2/1/99 Order for spousal support, attorney fees, and division of rental income, was vacated in light of Defendant's 2/10/99 Objections filed by newly retained counsel. Numerous new orders were entered. Defendant was ordered to pay a child support arrearage of $3,140 by March 7, 1999. The issue of spousal support, temporary and permanent, was referred to the Friend of the court for investigation, including whether Plaintiff's continued unemployment was voluntary. An income withholding order for $240.75 weekly child support was to enter and the FOC was to enforce the order (Order Vacating Order Re: Temporary Spousal Support, etc., 3/4/99).

Also on March 4, 1999, an Order Modifying Ex Parte Mutual Restraining Order was entered, vacating the earlier "Order Vacating in Part Ex Parte Mutual Restraining Order" entered on 11/13/98. Under the new modifying order, $50,000 worth of stock was redeemed from the Fidelity Investment Account TO 88566943, with $25,000

going to each party as advance property distributions for their respective attorney fees. From his $25,000 Defendant was ordered to pay the $3,140 in child support due as of 3/7/99 (Order Modifying Ex Parte Mutual Restraining Order, 3/4/99).

During the March 4 hearing, the trial court stated that, based on representations of counsel and a transcript of Tennessee court proceedings, "the lower court in the State of Tennessee in fact agrees with this Court [that Michigan has jurisdiction]." (MT, 3/4/99, p 9). Defendant appealed that decision in Tennessee (MT, 3/4/99, pp 4, 6).

In its March 4, 1999 Order vacating the 2/3/99 Order to Prevent the Removal of Minor Child from Michigan, the trial court stated, inter alia:

> 5. This court and the Honorable Muriel Robinson in the 4th Circuit Court for Davidson County, Tennessee at Nashville, have communicated and this Court is exercising jurisdiction of the child custody and visitation determinations pursuant to the UCCJA until further Order of this Court.
>
> (Order Modifying Order to Prevent Removal of Minor Child, etc., 3/4/99)

On March 5, 1999 Plaintiff filed a motion to compel answers to interrogatories that had apparently been served on 12/30/98 (Plaintiff's Motion, 3/5/99).

On March 18, 1999 Defendant filed an Amended Complaint for Absolute Divorce in his original Tennessee divorce action in Montgomery County, Clarksville, Tennessee, Case No. 98-05-0154, seeking sole custody of Alexander (Exhibit, attached to Plaintiff's

Motion to Amend [Visitation] Order, 3/25/99)[1].

On March 26, 1999 Defendant filed a response to Plaintiff's motion to compel requesting additional time to answer, stating that the interrogatories were 37 pages long, Defendant was a surgeon in the United States Army stationed in Kentucky, counsel had just been retained on 2/2/99, counsel's attention had been devoted to addressing visitation issues and correcting the erroneous 2/1/99 Order, Defendant's military duties through the month of May were prohibitive and had already been arranged around his first substantive parenting time being allowed with his minor son Alexander (Defendant's Response, 3/26/99).

At the March 29, 1999 hearing on Plaintiff's motions, Plaintiff's counsel stated that trial was scheduled for May 5, 1999 (MT, 3/29/99, pp 3-4). Defendants counsel, Mr. Griem, stated that he had just learned of the May 5th trial date and did not believe any notice had been included in the case file received from former counsel. The Friend of the Court investigation was not scheduled until April 23, 1999. Mr. Griem intended to move for an adjournment and asked for 60 days on the answers in light of

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[1] There were two Tennessee divorce suits pending. The second suit had been in Davidson County while the original suit was in adjacent Montgomery County (MT, 3/29/99, pp 7-8). Defendant had two different Tennessee attorneys -- one filed suit in Davidson County and the other filed suit in Montgomery County. Davidson County Judge Robinson had ordered custody matters be concluded in Michigan; that decision was appealed to the Tennessee Court of Appeals (MT, 3/29/99, p 9). Montgomery County Judge Catalano had determined to hold an evidentiary hearing on the jurisdiction issue on 5/21/99 (MT, 3/29/99, pp 9-12; Defendant's Motion to Adjourn Trial, 4/26/99, ¶ 8).

Defendant's onerous schedule (MT, 3/29/99, pp 4-5). The trial court agreed to 30 days to answer interrogatories (MT, 3/29/99, p 5).

On March 29, 1999 Montgomery County Judge Catalano spoke with Macomb County Judge Maceroni and apparently stated she would not enter any orders contrary to the Michigan court orders pending a 5/21/99 hearing in her courtroom on the jurisdiction issue (MT, 3/29/99, pp 9-12). If she determined that Montgomery County had custody jurisdiction, she would take jurisdiction of the divorce and property issues as well (Defendant's Motion to Adjourn Trial, 4/26/99, ¶ 8). Based on the trial court's discussion with Montgomery County Judge Catalano that day, plaintiff's motion to amend the upcoming specific visitation was denied (Docket entry notation, 3/29/00).

On 4/26/99 Defendant filed his motion to adjourn trial and enforce parenting time (Defendant's Motion, 4/26/99). The actual trial date was 5/11/99 (Id., ¶ 1). Defendant was scheduled for field training from 5/7/99 through 5/11/99 and possibly required for additional weeks of training due to the situation in Kosovo (Id., ¶3). Defendant's military duties precluded him from being in Michigan on the original trial date. Counsel requested a 60 day adjournment for reason that Defendant's Answers to Interrogatories were due on 4/29/99, after which counsel would have enough information to pursue a property settlement; counsel was newly retained in February; and the past two months had been taken up with parenting time issues, spousal support issues, and obtaining

release of funds for the parties. Counsel had not had adequate time to prepare for trial and Defendant would be prejudiced. The jurisdiction hearing in Tennessee was pending and the parties were also still waiting for the FOC report and recommendation on spousal support (Id., ¶¶ 6-9).

On May 3, 1999 Defendant's motions to adjourn trial and for specific parenting time were heard. Defendant repeated his arguments, advising that Defendant was anticipating some leave time the first part of July (MT, 5/3/99, pp 3-5, 7). Plaintiff also needed additional time to prepare for trial and had no objection to an adjournment, but requested 30 days and a June trial date (MT, 5/3/99, pp 5-6). The court remarked that based on his conversation with Tennessee Judge Catalano, she would be declining jurisdiction (MT, 5/3/99, p 7). In light of Defendant's position, the Court agreed to a July trial date (MT, 5/3/99, pp 7-8).

On May 19, 1999 an Order Adjourning Trial from 5/11/99 to July 7, 1999 was entered (Order, 5/19/99).

On June 11, 1999 Defendant's attorneys filed a motion to withdraw alleging that Defendant had not paid his attorney fees and that the relationship had deteriorated to a point where attorney and client could no longer work together. The parties were still waiting for the FOC report on spousal and child support. Withdrawing counsel requested a 120 day adjournment of trial for Defendant to hire and prepare new counsel. Defense counsel cited Defendant's circumstances as a Lieutenant Colonel in the United States Army assigned to Blanchard Community Hospital at Fort

Campbell, Kentucky where he is Chief of Surgery and Director of Regional Trauma Network (Motion to Withdraw, 6/11/99).

At the hearing on the motion, defense counsel David Griem advised that "it is more of a matter of just a total breakdown in the attorney/client relationship." (MT, 6/21/99, p 3). Defendant and attorney Sharon LaDuke were totally at odds over how the case should proceed (MT, 6/21/99, p 3). Under the circumstances Mr. Griem requested the 7/7/99 trial be adjourned and advised that Defendant had already talked to attorneys James M. Biernat and Felice Iafrate and would be retaining one of them (MT, 6/21/99, p 3-4). Plaintiff's counsel had no objection to withdrawal but objected to the adjournment on grounds that the trial had been adjourned once, the case was old, and the July 7 date was selected because it would not interfere with Defendant's military duties (Id). Plaintiff's counsel also complained that the military had not yet effectuated the Income Withholding Order so that child support had not been paid since March 4, 1999. Plaintiff was still unemployed (MT, 6/21/99, pp 4-5). The trial court granted the motion to withdraw and gave Defendant 10 days to obtain new counsel or act in pro per. The July 7 date was maintained "for the time being." The court advised Plaintiff's counsel "in all honesty, depending on what happens within the next ten days we are definitely going [to] meet on the 7th but . . . because of his military obligation . . . that date will be kept in one form or another . . . he is ordered to be here on July the 7th. And he is ordered to get counsel by July 1st." (MT, 6/21/99, p 6).

On June 28, 1999 an Order Granting Motion to Withdraw was entered, effective 6/21/99. Defendant was ordered to obtain substitute counsel by July 1, 1999; to appear with substitute counsel on July 7, 1999; and to bring child support current by July 7, 1999 (Order, 6/28/99).

On July 2, 1999 Plaintiff filed a Request for Production of Documents under MCR 2.310, demanding production within 28 days (Request for Production, 7/2/99).

On July 2, 1999 Plaintiff filed a Motion for Temporary Alimony, Attorney Fees, and Possession of Vehicle (Plaintiff's Motion, 7/2/99), complaining that the FOC had still not issued its recommendation from the April 23, 1999 investigation interview.

On July 6, 1999 Defendant, in pro per, filed a response to Plaintiff's Motion, again objecting to jurisdiction (Defendant's Response, 7/6/99, ¶¶ 2-3). Defendant attached his current Leave and Earnings Statement showing a monthly take home pay of $3968 after child support deductions (Id., ¶ 3). Defendant detailed his monthly expenses in excess of his monthly earnings, his substantial and prohibitive attorney fees, and his lack of access to any investment income due to the Mutual Restraining Order (Id., ¶¶ 3-4). Defendant proposed that $150,000 be released to each party as a partial final settlement and for attorney fees for each party (Id., ¶5, prayer for relief).

On July 6, 1999 Defendant also filed a motion for continuance of the July 7, 1999 hearing date (Defendant's Motion, 7/6/99). Defendant cited significant outstanding discovery which prior

counsel had failed to obtain (Id., ¶¶1-2) and the need to obtain counsel when attorneys were reluctant to be retained unless assured of a sufficient time to prepare. Further, on 6/30/99 Defendant had received military readiness orders to prepare for deployment for Kosovo on July 10, 1999. Defendant requested a continuance until his return from service deployment and until such time as he could obtain counsel and resolve outstanding discovery issues. Defendant attached a copy of his June 30, 1999 Military Orders (Motion for Continuance, 7/6/99, attached U.S.A. military readiness deployment warning order).

By letters addressed to Macomb County Judge Maceroni dated 6/16/99 and 6/30/99, both filed with the court clerk on 7/8/99, Defendant requested that the court partially vacate the restriction on assets so that Defendant could have funds to retain new counsel. Defendant advised that prior counsel did not prepare interrogatories nor depose witnesses he had requested. Defendant was totally unprepared for any final settlement. Due to his military situation and the constraints imposed by his military duties, Defendant requested 120 days to obtain and prepare counsel. To show good faith and to alleviate financial constraints on both parties, Defendant proposed a partial release of assets in the amount of $150,000 to each party (6/16/99 letter). Defendant advised he already had a good prospect for new counsel (6/30/99 letter).

At the July 7, 1999 hearing date Defendant appeared in pro per. Defendant had already talked to prospective new counsel James

M. Biernat, who had sent a copy of Defendant's military orders to the court and to opposing counsel (MT, 7/7/99, p 5). Plaintiff's counsel agreed that Defendant was entitled to an adjournment (Id., p 6). Defendant again complained of outstanding discovery (Id., pp 8-10). Based on the circumstances and in light of Defendant's documented orders, the trial court agreed to an adjournment of 30 - 45 days subject to Defendant's changing military status (Id., p 10). Defendant argued for a release of assets to hire new counsel and argued his difficult financial situation (Id., pp 30-32). Plaintiff argued against allowing Defendant any funds because it would "take away his incentive to negotiate in good faith" and prolong litigation (Id., p 21). The trial court ultimately agreed to release $5,000 to Defendant to retain counsel and $5,000 to plaintiff's counsel for fees (Id., p 34). The court further ordered that Defendant was to pay $4800 in child support by 7/31/99 (Id., p 18).

Defendant also argued a motion for reconsideration of the court's 9/24/98 Opinion and Order, arguing for an evidentiary hearing on the issue of plaintiff's intent (MT, 7/7/98, pp 22-26).[2] The motion was denied as untimely on procedural grounds (Id. p 27).

By the day of the July 7, 1999 hearing, Montgomery County Judge Catalano had elected to stay the Tennessee proceedings pending a final outcome in Michigan (MT, 7/7/99 p 28).

On July 14, 1999 the Friend of the Court filed its Report and

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[2] Defendant's written motion, dated July 7, 1999, was not noted as "filed" by the court clerk until July 30, 1999.

Recommendation regarding spousal support, recommending $1500 a month interim alimony, and transitional alimony not beyond 2/1/00 (Id., p 4, dated 7/8/99).

On July 16, 1999 Defendant filed a Motion to Partially Vacate Restriction on Assets, etc., again raising the jurisdiction issue, and again requesting a release of funds to hire counsel, requesting court's consideration for having to litigate from 700 miles away, and detailing his financial difficulties (Id, ¶¶ 2, 17-18, prayer for relief).

On 7/23/99, pursuant to the 7/7/99 motion hearing, the Court entered two separate orders. The 7/23/99 "Order Authorizing Release of Funds from Brokerage Account" allowed $5,000 to be withdrawn by check payable to Plaintiff's counsel and $5,000 to be withdrawn by check payable to Defendant (Id.). The "Order re: Adjourning Trial, Denial of Defendant Motion for Reconsideration, Payment of Child Support, etc.", provided, inter alia, that Defendant's Motion to Adjourn was granted to August 25, 1999 at 9:00 a.m.; ordered Defendant to pay $4,800 child support before 7/31/99; and ordered Defendant to pay plaintiff's counsel $5,000 before July 31, 2000.

On July 30, 1999 Defendant filed a Motion to Partially Vacate Restrictions on Assets, Reconsider Jurisdiction Issue, Deny Spousal Support, and for a Continuance of the 8/25/99 trial date until counsel could be obtained, and requesting a hearing date of 8/23/99 (Defendant's Motion, 7/30/99). Defendant again raised the issues of outstanding discovery, lack of funds, and his inability to hire and

prepare counsel.

On 8/25/99 the parties appeared for the scheduled trial date. Defendant appeared in pro per (T1, p 3). Defendant argued that he needed and wanted counsel but did not have the funds to hire counsel and needed funds released for that purpose (T1, pp 4-8). Plaintiff's counsel admitted that the funds ordered released on 7/7/99 via the 7/23/99 Order had not yet been released by the brokerage account (T1, p 8). Defendant repeated his financial situation outlined and documented to the court in his previous motions and at the 7/7/99 hearing, including the fact that the court had also ordered Defendant to pay $4800 in child support by 7/31/99, and implored the court for funds to hire attorney Jim Biernat (T1, pp 9-12). Plaintiff's counsel admitted that he believed the $10,000 ordered released in July was to be distributed $5,000 to Plaintiff's counsel and $5,000 for child support ($4800) (T1, p 13). Defendant also believed that he had to pay $4800 in child support or be held in contempt. Review of the record on 7/7/99 showed that the court had ruled that $5000 was to be released to Defendant to hire attorney James Biernat, but the two Orders entered on 7/23/99 did not actually reflect that ruling nor were any funds ever released pursuant to the two Orders (T1, pp 19-21; see also pp 258-259 and Judgment of Divorce, 11/6/00, p 8). Defendant had immediately contacted and met with attorney James Biernat for a lengthy period of time after the 7/7/99 hearing and had promised to get a retainer (T1, pp 21-24). The court ultimately refused to grant a continuance because the next

available trial date would be in November (T1, p 24).

Trial proceeded over the next three days with Defendant in pro per. Plaintiff and Defendant were the only witnesses. Defendant made repeated prejudicial errors regarding the governing law, introduction of evidence, establishing his case, impeachment, objections, direct examination, cross examination, relevancy, opening statement, closing argument, procedure, subpoenaing witnesses, etc., etc., etc. See for example, the following pages:

> T1, first day of trial, pp 37, 40, 44, 52, 54, 62-63, 64-65, 83-84, 92-93, 107, 121, 125-126, 127,128-130, 138-139, 140-142.
>
> T2, second day of trial, pp 166, 169-171, 173, 183-184, 191-192, 193-197, 204-210, 219-221, 228-229, 232-236, 238, 241-254, 256-257, 265-277, 277-282, 293-303.
>
> T3, third day of trial, pp 313-318, 337-339, 340-341, 345, 348-349, 351-352, 355-357, 358, 361-363, 365-367, 368-370, 371-377, 378-380, 381, 415.

The court ruled at the close of trial that Plaintiff could submit a supplemental brief, Defendant could respond. The issue of parenting time was referred to the Friend of the Court (T3, pp 431-432; see 9/7/99 Order Referring to FOC and ordering the referral expedited).

On November 12, 1999 attorney James M. Biernat entered his appearance on behalf of Defendant.

On November 18, 1999 Plaintiff filed a motion seeking various forms of additional relief regarding property and attorney fees against Defendant for various alleged transgressions (Plaintiff's Motion, 11/18/99). Defendant filed a response on 12/16/99 and also filed a motion for visitation.

At the 12/17/99 hearing on Defendant's motion for holiday visitation Plaintiff's 11/18/99 motion was adjourned to February 10, 2000 to give the parties a chance to resolve the issues. The date was also chosen as the same date that the FOC had scheduled for its investigation on parenting time pursuant to the 9/7/99 Order of Referral, the court opining that the case could not be finalized until then (MT, 12/17/99, pp 6-8).

On February 10, 2000 all issues raised in Plaintiff's 11/18/99 motion were resolved between the parties at the scheduled hearing. The trial court rendered its opinion from bench on all issues as to custody, alimony, property, and attorney fees. The issue of parenting time was reserved pending the FOC issuing its report (MT 2/10/00, pp 62-81).

On 4/20/00, following the appointment of attorney James M. Biernat to the Macomb Circuit Court bench, present counsel substituted for Defendant. A Judgment of Divorce reflecting the trial court rulings on 2/10/00 was eventually entered on November 6, 2000.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ASSUMED JURISDICTION OVER THIS CASE IN VIOLATION OF MCL 552.9 WHERE PLAINTIFF HAD ADMITTEDLY NOT PHYSICALLY LIVED IN MICHIGAN FOR 180 DAYS BEFORE FILING SUIT, ADMITTEDLY HAD NOT PHYSICALLY LIVED IN MICHIGAN FOR MORE THAN 15 YEARS, AND THE TRIAL COURT DECIDED THE ISSUE OF "INTENT" ON THE BASIS OF COMPETING AFFIDAVITS AND REFUSED TO HOLD AN EVIDENTIARY HEARING.

A. Standard of Review.

Defendant's motion to dismiss was brought under MCR

2.116(C)(4). Whether a court has subject-matter jurisdiction is a question of law. Universal Am-Can Lts. v Attorney General, 197 Mich App 34, 37 (1992). The decision is reviewed de novo. Borman v State Farm Fire and Casualty Co., 198 Mich App 675, 678 (1993). The reviewing court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. Steele v Dep't of Corrections, 215 Mich App 710, 712 (1996).

B. Preservation of Issue.

Defendant moved to dismiss on these same grounds (Motion to Dismiss, 7/7/98). Defendant repeatedly raised the issue of subject matter jurisdiction throughout the pendency of this case. Subject matter jurisdiction may be raised at any time, including for the first time on appeal. Lehman v Lehman, 313 Mich 102, 105 (1945).

C. Discussion of Issue

The trial court denied Defendant's motion to dismiss for lack of subject matter jurisdiction under MCL 552.9 for the following reasons:

> Here, the parties were married in Michigan. Plaintiff's mother, father and other relatives reside here. Plaintiff maintained her voting privileges consistent with her intent to reside in Michigan. Further, Plaintiff has a Michigan Driver's License and has paid dues for a health club membership in Eastpointe for the past 17 years. Plaintiff has also provided an affidavit which satisfies the Court plaintiff intended to retain Michigan as her residence although she moved several times while married to defendant. Additionally, the Court accepts plaintiff's statements in her affidavit to the effect she was a resident of Macomb County for at least 10 days prior to the date she filed her complaint and only returned to Tennessee in an effort to work

> things out with defendant. Unlike the defendant in Smith, supra, 218 Mich App at 727, defendant herein has not offered documentary evidence to raise a question of fact regarding plaintiff's residency. The Court is satisfied the jurisdictional requirements of MCL 552.9; MSA 25.89 have been met.
>
> (Opinion, 9/24/98, p 3).

De novo review compels the conclusion that the trial court has no subject matter jurisdiction over this case. First of all, there is absolutely no dispute here that Plaintiff never physically resided in the State of Michigan for the mandatory 180 day period. See Plaintiff's Summons, Complaint, Verified Statement, Record of Divorce and Annulment, all of record with the trial court. These records also show Plaintiff's Tennessee driver's license at the time the complaint was filed. Further, Plaintiff admits not coming to Michigan until March 24, 1998 (Plaintiff's Affidavit, attached to Plaintiff's Brief in Support of Answer to Motion, 7/21/98).

MCL 552.9(1) provides in relevant part:

> A judgment of divorce shall not be granted by a court in this state in an action of divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint . . .

Compliance with the state residency requirement as to the length of residency is jurisdictional. The failure of a court to comply renders a divorce decree absolutely void. Stamadianos v Stamadianos, 425 Mich 1, 6 (1986) (citations omitted). Jurisdiction cannot be conferred by waiver or consent. Smith v Smith, 218 Mich App 727 (1996). If the residency requirements are not met, the circuit court cannot grant a judgment of divorce and must dismiss the case. Stamadianos, supra.

MCL 552.9 has been repeatedly interpreted by the Michigan Supreme Court to mean actual residence, not constructive residence. Banfield v Banfield, 318 Mich 38 (1947) (wife who did not physically live in Michigan could not claim constructive residence via husband's actual residence here). In any case where the plaintiff has not actually physically lived within Michigan's borders for the statutory period, the Supreme Court has consistently held that Michigan did not have any jurisdiction or else has gone out of its way to distinguish the particular case on its "peculiar facts." There are no such peculiar facts here.

In Coyuoumjian v Anspach, 360 Mich 371 (1960), a Michigan woman was declared insane and institutionalized. Eight years later, while still under the legal custody of the institution, she was allowed to live with relatives in Pennsylvania for a year. At the end of the year she was declared legally sane and promptly filed for divorce in Michigan. Specifically stating that it did not intend to overrule or otherwise limit precedent under Banfield which precludes any "constructive residency", the Supreme Court held that in this peculiar case the woman did not lose her Michigan residence due to her absence from the state because her absence was in essence involuntary Coyuoumjian, supra at 382-384. There is no involuntary absence from Michigan here. Plaintiff freely and voluntarily left the state as far back as 1981 before she even met Defendant. Plaintiff freely and voluntarily married Defendant, knowing full well that Defendant was a career military doctor. A seventeen year absence from the State of Michigan cannot magically

be transformed into "residence" for purposes of jurisdiction under Supreme Court precedent.

It is also clear that residence includes both the fact of abode and the intention of remaining. Reaume v Silloway, Inc. v Tetzloff, 315 Mich 95 (1946). In Leader v Leader, 73 Mich App 276 (1977), the court held that although intent is a key factor, other factors to be considered are presence, abode, property ownership, and other pertinent facts. "Residence" in a divorce statute means the place where one resides. Banfield, supra. Here there is no abode at all. There is no domicile. There is no property ownership. In fact there is no residence. Intent simply cannot be the sole basis for "residency" nor is it under Supreme Court precedent. Otherwise the requirement would be meaningless. The trial court erred as a matter of law when it held otherwise.

Assuming alleged "constructive" residence can somehow confer subject matter jurisdiction, the trial court erred when it decided the issue on the basis of competing affidavits and then refused to hold an evidentiary hearing on the issue. Defendant's Affidavit clearly raised a question of fact regarding Plaintiff's intent. The Affidavits of the parties were directly contradictory. The issue of intent cannot be resolved on competing affidavit but must be explored via an evidentiary hearing. Smith v Smith, 218 Mich App 727 (1996). Repeatedly at trial the trial court then refused to allow Defendant to explore the jurisdiction issue. Subsequently at the 2/10/00 motion hearing after Defendant was represented by Mr. Biernat, defense counsel advised the Court that Plaintiff had

in fact entered into a $420,000 "jumbo" mortgage loan in Tennessee for the purchase of the marital home, expressly telling the bank manager that she fully intended to live and work in the state of Tennessee. Upon inquiry by the court, Plaintiff admitted her actions, but asserted it was "a huge mistake" because she "knew in the back of [her] mind that [she] couldn't stay married [anymore." MT 2/10/00, pp 11-17, 21-23. Previously Defendant had repeatedly tried to get the facts surrounding Plaintiff's clearly contradictory actions and even testimony in the Tennessee court evidencing her clear intent to make Tennessee her home before the trial court, all to no avail. See Defendants 7/6/99 Motion for Reconsideration; 7/16/99 Motion to Partially Vacate Restriction on Assets, etc.; and 7/30/99 Motion to Partially Vacate Restriction on Assets, etc. See also Defendant's closing argument, T3, pp 382-389.

Simply and clearly Plaintiff does not meet the statutory requirements for subject matter jurisdiction under MCL 552.9. As a matter of law, the trial court must be reversed. The Judgment and all its prior orders must be vacated and held void ab initio.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT ASSUMED CUSTODY JURISDICTION OVER THIS CASE IN VIOLATION OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE PARENTAL KIDNAPPING PREVENTION ACT WHERE IT FAILED TO TIMELY COMMUNICATE WITH THE TENNESSEE CHANCERY COURT AND WHERE TENNESSEE IS THE UNDISPUTED HOME STATE OF THE MINOR CHILD AND MICHIGAN HAS NO SIGNIFICANT CONNECTION JURISDICTION UNDER THE UCCJA.

A. Standard of Review.

Issues of law are reviewed de novo. Smith v Smith, 218 Mich

App 727, 729 (1996).

B. Preservation of Issue.

Defendant raised the UCCJA issue in his 7/7/98 Motion for Dismissal by Summary Disposition Pursuant to MCR 2.116(C)(4) and Brief in Support of Motion to Dismiss and also in Defendant's 7/22/98 Reply Brief. See also MT, 7/27/98, pp 4-5.[3] Defendant raised the PKPA and UCCJA issues in his 7/7/99 Motion to Reconsider the Jurisdiction Issue. Defendant raised these issues repeatedly in numerous pre-trial motions in pro per and throughout the trial and argued the issues in his closing argument (T3, pp 382-393).

C. Discussion of Issue.

The trial court ruled as follows:

> Finally, the Court is satisfied it has jurisdiction under the UCCJA, specifically MCL 600.653(1)(b); MSA 27A.653. Alexander has significant connections with this state as several of his maternal relatives reside here and there is substantial evidence available in Michigan regarding his present and future care. Further, as plaintiff's complaint for divorce was filed prior to defendant's complaint, the Court is satisfied Michigan has priority over any custody matters. See MCL 600.656(1); MSA 27A.656. Finally, the Court is not persuaded Michigan is an inconvenient forum. See MCL 600.657; MSA 27A.657.
>
> (Opinion and Order, 9/24/98, p 4).

The trial court erred as a matter of law. This issue is governed by the Uniform Child Custody Jurisdiction Act, which has been adopted in both Michigan and Tennessee. MCL 600.651 *et seq*

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[3] Defendant's 7/7/98 Brief in Support was not recorded as being filed with the circuit court clerk until September 24, 1998, the same date as the trial court issued its written opinion. However, it is clear that the court was in possession of both of Defendant's briefs -- see MT, 7/27/98, pp 3, 8.

and TCA 36-6-201 *et seq*. When an interstate child custody dispute is presented the trial court must analyze the issue under a multistep process in order to determine whether it may properly exercise jurisdiction. Moore v Moore, 186 Mich App 220, 223 (1990); Braden v Braden, 217 Mich App 331, 334 (1996). The first inquiry is to determine whether the court has jurisdiction at all pursuant to § 3 of the statute, MCL 600.653. Of the four possible statutory bases of jurisdiction enumerated in § 3, the trial court found that it had jurisdiction under subsection (1)(b):

> (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents, or the child and at least 1 contestant, have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Assuming for the moment that this preliminary finding is correct, the inquiry does not come to an end once a basis for jurisdiction has been found. Rather, the trial court must then determine whether another state also has jurisdiction under § 3. Moore, supra at 224. Here it is indisputable that Tennessee also had jurisdiction over the custody dispute as the home state of the child under § 3(1)(a):

> (a) This state is the home state of the child at the time of commencement of the proceeding or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state.

By statutory definition, Tennessee is the child's home state,

defined in MCL 600.652(e) for purposes of § 3(1)(a) as:

> the state in which the child immediately preceding the time involved lived with his or her parents . . . for at least 6 consecutive months . . . .
>
> MCL 600.652(e); MSA 27A.652(e)

By Plaintiff's admission, Alexander resided in Tennessee with both his parents for more than six consecutive months immediately preceding the filing of the Michigan complaint (Plaintiff's Answer to Motion, 7/21/98, p 2, § 4). Despite dancing all around the obvious home state jurisdiction of Tennessee in her brief (Plaintiff's Brief in Support of Answer, 7/21/98, pp 4-5), Plaintiff's counsel acknowledged at oral argument that both state courts had jurisdiction (MT, 7/27/98, p 7). Plaintiff's counsel further agreed at oral argument that the courts of Michigan and Tennessee had to confer on the issue:

> Defendant's Counsel: ". . . it is incumbent upon the Court and the Tennessee Court to decide which of the two courts . . . will exercise jurisdiction to make a child custody determination. And I think we both agree to that."
>
> Plaintiff's Counsel: "I do agree with that last statement made by counsel, Your Honor, but that's all I agree with."
>
> (MT 7/27/98, p 5).

Here the trial court committed a fundamental error of law when it failed to follow the mandates of the statute and case law interpretation of the requirements of the act. Basically ignoring Tennessee's home state jurisdiction, the court jumped immediately to MCL 600.656(1) to decide it had jurisdiction due to "priority in time". That is simply not the meaning of subsection (1). That

subsection **precludes** the exercise of jurisdiction:

> (1) A court of this state **shall not exercise its jurisdiction** under sections 651 to 673 if at the time of filing the petition a proceeding concerning the custody of the child is pending in a court of another state exercising jurisdiction substantially in conformity with sections 651 to 673, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons or unless temporary action by a court of this state is necessary in an emergency to protect the child . . .
>
> MCL 600.656(1) (emphasis supplied).

Thus subsection one is clearly not any **grant** of jurisdiction, nor does it, standing alone, control the statutory process. Rather, section 656, read in its entirety, compels a trial court upon a determination that another state also has jurisdiction and that another action is pending to stay the current proceeding and communicate with the other state court to make the proper determination as to which court should proceed:

> (3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child **was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending** to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with section 669 to 672. . . .
>
> MCL 600.656(3) (emphasis supplied).

This reading of subsections (1) and (3) together has already been made by this court in Moore v Moore, 186 Mich App 220 (1990):

> "If it is decided that both states have jurisdiction, the court shall not decline to exercise its jurisdiction pursuant to MCL 600.656(1); MSA 27A.656(1), but instead shall follow the procedure set forth at MCL 600.656(3); MSA 27A.656(3) and communicate with the [Kentucky] court to decide the appropriate forum."
>
> Id. at 228 (citations omitted).

See also Braden, supra at 336-337. Here the trial court knew that an action was pending in the Tennessee court long before it exercised jurisdiction by virtue of its 9/24/98 Opinion and Order. As a matter of law it was incumbent on the trial court to stay the proceedings and communicate with the Tennessee court pursuant to subsection (3). Just as a court may not automatically decline jurisdiction because of any apparent "first in time filing", neither may a court automatically take jurisdiction on the basis of any apparent "first in time filing."

Priority in time of filing ordinarily controls only when the priority filing state is exercising its jurisdiction in substantial conformity with the act. By failing to communicate with the Tennessee court as mandated by the Act, the trial court did not "exercise its jurisdiction in substantial conformity." Thus any alleged "priority in time filing" cannot be controlling. Moore, supra at 224; Braden, supra at 336-337. While the filing of the Tennessee petition did not *prima facie* constitute Tennessee "exercising jurisdiction", neither did the filing of the Michigan petition -- or the issuance of ex parte orders -- constitute Michigan "exercising jurisdiction." Moore at 225 (citation omitted); Braden at 337. Thus the trial court's assumption of jurisdiction on the simplistic fact of "first in time filing" without first conferring with the Tennessee court as mandated by the act was clear legal error.

A court which fails to communicate with another state court has not exercised its jurisdiction (if any) in substantial

compliance with the UCCJA. Moore at 226-227. Accordingly, the order must be vacated and the case remanded.

The trial court erred on another basis as well, for there is simply no possibility that Michigan can have "significant connection" jurisdiction in the first place. The statute plainly requires that both the child **and** at least one parent have a "significant connection" with Michigan. This child has absolutely NO connection with Michigan -- the child was not born here and the child has never lived here. His only "connection" to Michigan is **through** his 40 year old mother -- and she has nothing but a childhood home she long ago abandoned at the age of twenty three. The **child's** "significant connection" to a state is **not** the family roots of a parent; otherwise, there would be no necessity for the clear statutory requirement that the **child** have an independent "significant connection" on his or her own. Every child has a parent who has grown up somewhere; the interpretation accorded by the trial court means that every child automatically has "significant connection" to Anystate, USA by virtue of the parent's origin of birth. Such an interpretation flaunts the very purpose of the UCCJA -- to deter abductions and unilateral removals of children to obtain custody awards. MCL 600.651(1)(c). See also Brown v Brown, 847 SW2d 496 (Tenn. 1993) (presence of parent, relatives, and fact of child's birth and residence for five months insufficient to establish "significant connection" jurisdiction). A parent's state of origin simply is not and cannot be synonymous with a child's significant connection to a state for purposes of

UCCJA jurisdiction. Again, the trial court must be reversed.

Any subsequent contacts between the trial court and the Tennessee courts occurred after the damage had been done. Once the Michigan court decided wrongly that it had jurisdiction and insisted that it would exercise and retain jurisdiction, the Tennessee courts reacted as though their hands were tied. Defendant is in a complete catch-22: Tennessee courts won't act while Michigan claims jurisdiction, and the Michigan court won't back down so the Tennessee courts can act. This is the exact situation the UCCJA was enacted to prevent.

Finally, the trial court must also be reversed because its actions are in clear violation of the federal Parental Kidnapping Prevention Act (PKPA), 28 USC § 1738A(a). See In re Clausen, 442 Mich 648, 668-674). The PKPA mandates that a child custody determination is consistent with the PKPA "only if" the court making the determination had jurisdiction under its own laws **and** the state was the home state of the child when the proceedings were commenced. 28 USC §1738A(c)(1). At the time these proceedings were commenced, Michigan was unquestionably **not** the home state of this child. Thus Michigan's assumption of custody jurisdiction on 9/24/98 was in violation not only of the UCCJA but also in violation of the PKPA. Only if the state of Tennessee defers to Michigan can Michigan take jurisdiction consistent with the PKPA. 28 USC §1738A(f). Tennessee has not declined to exercise its jurisdiction; rather, Tennessee has attempted to comply with the UCCJA by staying the custody and divorce proceedings pending a

resolution. As of this writing, the Tennessee Montgomery Court continues to hold the matter in abeyance.

Under all of the above cited law and the facts of this case, the trial court must be reversed and its orders vacated.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED DEFENDANT DUE PROCESS OF LAW WHEN IT DENIED DEFENDANT'S MOTION TO ADJOURN TRIAL SO DEFENDANT COULD HIRE COUNSEL WHERE THE TRIAL COURT'S PRIOR ORDER ACKNOWLEDGING DEFENDANT'S NEED AND ALLOWING DEFENDANT FUNDS TO HIRE COUNSEL HAD NOT YET BEEN IMPLEMENTED, THERE WAS NO SHOWING OF LACK OF DILIGENCE BY DEFENDANT NOR INJUSTICE TO PLAINTIFF, AND THE COURT'S SOLE CONCERN WAS ITS DOCKET.

A. Standard of Review.

A motion for adjournment must be based on good cause. A court in its discretion may grant an adjournment to promote the cause of justice. MCR 2.503; In re Krueger Estate, 176 Mich App 241, 247 (1989). A trial court's decision on a request for adjournment or continuance is reviewed for an abuse of discretion. Zerillo v Dyksterhouse, 191 Mich App 228 (1991).

B. Preservation of Issue.

Defendant repeatedly moved for an adjournment in order to hire and prepare counsel in various pretrial motions between July 16, 1999 and the day set for trial.

C. Discussion of Issue.

Cases upholding the denial of a continuance or adjournment have always involved some combination of (1) numerous past continuances; (2) failure of the movant to exercise due diligence, and (3) lack of any injustice to the movant. Roselott

v County of Muskegon, 123 Mich App 361, 370-371, lv den 418 Mich 869 (1983).

Applying these factors, it is patent that the trial court abused its discretion here. Although the case was filed in April 1998, the court never resolved the jurisdiction question until September 1998. Defendant's original counsel withdrew to move his practice out of state in February 1999. Defendant diligently and quickly obtained substitute counsel. Plaintiff and defendant both agreed that the first trial date set for 5/11/99 had to be adjourned. Neither party was ready for trial and numerous discovery issues were outstanding. Defendant's second counsel then withdrew over an acknowledged fundamental, irreconcilable difference between attorney and client. The second trial date of 7/7/99 was recognized by the court as likely not to be a trial date at all under the circumstances.

Defendant, stationed in the United States Army some 700 miles away, should clearly not be held to the same standard as a local litigant. Further, both the first and second trial dates were adjourned by agreement of the parties and also based on the fact of Defendant having received military deployment orders conflicting with the court dates.

Defendant clearly and timely requested funds to hire new counsel. The trial court recognized Defendant's need and granted him access to such funds. It is undisputed that Defendant never in fact received the funds that the court had already recognized he needed and should have to hire counsel. The sole reason the trial

court appears to have denied the continuance was because of its docket. Under the circumstances, the trial court abused its discretion.

This case was not so old that a trial in November 1999 was burdensome for the court docket or the Plaintiff. There was no prejudice to Plaintiff here. Plaintiff was still sending out discovery requests on July 2, 1999. The parties were still waiting on the FOC recommendation on spousal support. Defendant had offered repeatedly to disburse substantial funds to Plaintiff. Plaintiff's refusal indicates that Plaintiff was not in any such dire need nor indeed in any big hurry to obtain a property division. The prior two adjournments cannot be "blamed" on Defendant where military orders precluded such trial dates in the first place. Properly considered, Defendant's request to adjourn the August 25, 1999 trial date to obtain and prepare counsel was actually his first such request. See Ruffin v Kent, 139 Mich App 479 (1984); See and compare to Johnkoski v Johnkoski, 50 Mich App 542 (1973).

Particularly where the trial court had already granted Defendant's motion for access to funds for the purpose of hiring counsel, yet the funds had admittedly not even been released yet through no fault of Defendant, the trial court's denial of the motion was clearly an abuse of discretion. Defendant showed good cause; defendant moved with due diligence; yet Defendant clearly suffered injustice by being forced to "try" his case without the assistance of counsel.

Due process requires fundamental fairness and applies to any

adjudication of important rights. Dobrzenski v Dobrzenski, 209 Mich App 514, 515 (1995). The dissolution of a marriage involves "interests of basic importance in our society." Boddie v Connecticut, 401 US 371, 374 (1971). The trial court clearly abused its discretion and denied Defendant due process. Defendant is entitled to a new trial.

CONCLUSION AND RELIEF REQUESTED

For all of the above reasons, the judgment of the trial court must be vacated and held null and void from its inception. Otherwise Defendant is entitled to a new trial.

Respectfully Submitted,

MARGUERITE ANN HANES (P47690)
Attorney for Defendant-Appellant

Dated: June 17, 2002